B N Textile Inc. v Alhalabi
2023 NY Slip Op 32335(U)
July 10, 2023
Supreme Court, Kings County
Docket Number: Index No. 510480/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
---x
B N TEXTILE INC.,
Plaintiff,
Decision and order

- against -
Index No. 510480/2022

HENRI ALHALABI, LMT NYC INC., OLMT NYC INC. and JOHN DOES 1-10,
Defendants,
July 10, 2023
---x
PRESENT: HON. LEON RUCHELSMAN
Motion Seq. #4 & #5

The plaintiff and the defendants have both moved pursuant to CPLR §2221 seeking to reargue portions of a decision and order dated April 18, 2023. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision, according to the Verified Complaint, the plaintiff corporation is solely owned by Vectour Alhababi. The corporation sources, manufactures and wholesales white label garments for retail sale in the United States. The defendant Henri Alhalabi, Vectour's brother worked at the plaintiff company since 2003. The Verified Complaint alleges Henri established the defendant corporations and diverted clients, materials and goods and funds away from the plaintiff to his other entities. The plaintiff has asserted causes of action for violations of the faithless servant doctrine, breach of fiduciary duties, tortious interference with prospective economic advantage, unfair competition and unjust enrichment. In the

prior decision the court denied plaintiff's discovery request seeking information after Henri stopped working for Vector. The court reasoned there was nothing improper with Henri soliciting Vector's clients once Henri left Vector's employment. The court did permit discovery sought during Henri's employment on the grounds Henri owed a duty to the company and any actions that did not further the best interests of the company could constitute a breach of a duty to the company. Upon reargument the plaintiff asserts the court ignored binding precedent that holds post-employment conduct that continues from conduct during employment is discoverable. Further, the plaintiff argues it is "incongruous" to allow discovery during employment but to foreclose the same conduct after employment (see, Affirmation in Support, ¶¶4, 16 [NYSCEF Doc. No. 122]).

The defendants have also moved seeking reargument and clarification of the prior decision.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

The plaintiff does not dispute that a former employee may

solicit customers of the former employer. The plaintiff merely asserts that no such solicitation is permitted where the employee engaged in wrongful conduct.

In Starlight Limousine Service Inc., v. Cucinella, 275 AD2d 704, 713 NYS2d 195 [2d Dept., 2000] the court reiterated that "solicitation of an entity's customers by a former employee or independent contractor is not actionable" (id). However, the court qualified that rule and stated "unless the customer list could be considered a trade secret, or there was wrongful conduct by the employee or independent contractor, such as physically taking or copying files or using confidential information" (id). The plaintiff argues the court already concluded there were questions whether the defendant engaged in improper conduct thus surely the defendant engaged in 'wrongful conduct' sufficient to permit discovery after the employment ended. The plaintiff stresses that the examples in Starlight (supra) constituting wrongful conduct "are mere examples of wrongful conduct—not an exclusive list" (see, Affirmation in Support, ¶12, Footnote 3 [NYSCEF Doc. No. 122]). The defendant argues no such improper conduct took place which would warrant post-employment discovery.

The seminal case dealing with solicitation of clients by former employees is Leo Silfen Inc., v. Cream, 29 NY2d 387, 328 NYS2d 423 [1972]). In that case the plaintiff company alleged that a former employee, the defendant Cream, wrongfully solicited

the plaintiff's customers by making copies of plaintiff's secret and confidential customer files. The court primarily dealt with whether customer lists are indeed trade secrets. Before addressing that issue the court observed that "notably, plaintiffs did not attempt to sustain their allegation that Cream had made copies of plaintiffs' secret and confidential files, or used the recorded detail in those files with respect to each customer's 'profile'. The solicitation of plaintiffs' customers was at most the product of casual memory, or, as defendants would have the court believe, coincidence. If there has been a physical taking or studied copying, the court may in a proper case enjoin solicitation, not necessarily as a violation of a trade secret, but as an egregious breach of trust and confidence while in plaintiffs' service...Nor is there any allegation or evidence of other wrongful or fraudulent tactics employed by Cream in connection with the solicitation of plaintiffs' customers. If there had been, a court might award damages and enjoin further similar conduct as constituting unfair competition" (id). Thus, the only issue for the court to decide was whether such customer lists were in fact trade secrets.

Clearly, a former employee that engages in wrongful conduct, whether still employed or even after employment, of any variety, cannot shield herself from liability on the grounds she is permitted to solicit and compete with her former employer. The

case of Mal Dunn Associates Inc., v. Kranjac, 145 AD2d 472, 535 NYS2d 430 [2d Dept., 1988] does not demand a contrary result. In that case the defendant Paulette Kranjac asked one of the clients if the client would continue to do business with her if she would leave the plaintiff's employment and start her own firm. The court held such "preliminary inquiries" did not amount to any breach of a duty on the part of Kranjac. In this case, however, the Verified Complaint alleges that Henri lied to the plaintiff and told plaintiff that COVID-19 had caused a slowdown in purchases. However, purchase orders were still made and Henri had the customers pay to accounts only controlled by Henri. While these allegations will be subject to discovery, at this juncture they surely allege wrongful conduct.

Further, the other cases cited by the defendant only bolster the plaintiff's arguments. In Ashland Management Inc., v. Atair Investments NA LLC, 14 NY3d 774, 898 NYS2d 542 [2010] the court reiterated the rule, not applicable here, that an employee may solicit clients upon termination. The court also noted that there were "questions of fact regarding whether defendants breached their fiduciary duties by using plaintiff's time and resources to form a new business and promote themselves while still working for plaintiff" (id). Again, in 30 FPS Productions Inc., v. Livolsi, 68 AD3d 1101, 891 NYS2d 162 [2d Dept., 2009] the court explained that an employee may even form a corporation

while employed by another "without breaching any fiduciary duty unless the employee makes improper use of the employer's time, facilities, or proprietary secrets in doing so" (id). The court held that "the plaintiff demonstrated its prima facie entitlement to judgment as a matter of law on the cause of action to recover damages for breach of the duty of loyalty and fidelity by presenting evidence that the defendant, its former employee, utilized the plaintiff's time and facilities to organize competing businesses while still in its employ. The plaintiff also presented evidence that the defendant, by soliciting a job from one of its prospective clients while he was still employed by it, and later performing the job after his resignation, 'secretly pursued and profited from [an] opportunit[y] properly belonging to his employer'" (id). These cases highlight that Henri's conduct, as alleged, surely raises legitimate questions whether he breached any duties, both while employed and after employment. Lastly, any issue regarding the appropriate calculation of damages does not have any bearing upon whether the discovery sought is appropriate in the first place.

Therefore, based on the foregoing, the motion seeking reargument is granted. Upon reargument the motion seeking discovery as outlined in the plaintiff's discovery requests is granted. Thus, the defendant must furnish all information sought in Interrogatory Numbers 7 and 11 (NYSCEF Doc. No. 50) and

Document Demand Responses Numbers 4, 8, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 (NYSCEF Doc. No. 49) through December 2021 within thirty days of receipt of this order. Considering the broad reach of the discovery that now must be furnished, the actual date of Henri's termination need not be decided at this time.

Concerning interrogatory number 9, the production of all the discovery that is now required renders the password for Henri's private and business email accounts unnecessary. If plaintiff can present a basis for such a request after all the above discovery has been produced then such request may be presented to the court. Lastly, the request seeking to extend deadlines contained in the preliminary conference order is granted. The parties are directed to mutually agree upon new dates that conform with this order.

So ordered.

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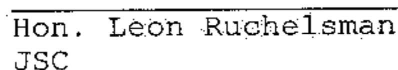

DATED: July 10, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC